In the Supreme Court of the United States

OCTOBER TERM, 1970

No. ~~000~~ 70-31

PORT OF PORTLAND, et al.,
Appellants,

vs.

UNITED STATES OF AMERICA, et al.,
Appellees.

On Appeal from The United States District Court
for The District of Oregon

Brief in Opposition to Motions to Affirm

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Brief in Opposition to Motions to Affirm

Pursuant to Rule 16, Paragraph 4 of the Rules of this Court, appellants file this Brief in Opposition to Motions to Affirm filed by appellees, Spokane, Portland and Seattle Railway Company, Union Pacific Railroad Company and the Interstate Commerce Commission. The statutory defendant, United States of America, has heretofore filed a "Memorandum for the United States" which supports the position of appellants.

Appellants will reply to each of the Motions to Affirm separately and will be brief since many of the points raised in the Motions to Affirm simply do not come to grips with the questions presented in the Jurisdictional Statement.

REPLY TO MOTION OF APPELLEES SPOKANE, PORTLAND AND SEATTLE RAILWAY COMPANY AND UNION PACIFIC RAILROAD COMPANY TO AFFIRM.

1. The Commission Applied Erroneous Legal Tests in Determining Public Interest.

a) The Commission Ignored the Rivergate Area.

In rebutting the allegations of the Jurisdictional Statement as to the substantiality of this question, the appellees claim the Interstate Commerce Commission in its Decision gave full consideration to the Rivergate area. This is simply not so. Appellees recognize that the close proximity of the Rivergate area to Peninsula's main line and the potential connection of Peninsula with the proposed Rivergate rail system was the factor which gave rise to unusual carrier, industry and public agency interest in this proceeding (Motion to Affirm, p. 3). However, the Commission in deciding this case chose to ignore Rivergate as a factor in resolving public interest. Its language is plain and unambiguous:

> ". . . we consider Peninsula, rather than the entire Portland area, to be the focus of our attention here in resolving the public interest factor." (J.S., App. B-20)

Appellees claim that since the position of intervenors (appellants here) was set forth in excerpts from the Hearing Examiner's Report and appended to the Commission's Decision, the Commission necessarily considered Rivergate as a factor in resolving public interest. The simple answer to appellees' claim is that the Commission by its language, *supra*, has made it crystal clear that it refused to consider Rivergate. The availability of the evidence had no bearing —it was not considered.

Appellees also seek to leave the impression that there is nothing in the record which would substantiate the fact

that Peninsula will be used as a means for serving the east end of Rivergate. (Motion to Affirm, p. 9) This is startling since a witness on behalf of appellees stated that changes would be made in Peninsula's tracks to connect with Rivergate when required by the traffic. (R-27, Ex. 26, p. 10)* That there will be a large amount of traffic to and from Rivergate is undisputed and at full development, 500 to 600 freight cars per day will be handled to, from or within the Rivergate area. (R-27, Ex. 1, p. 5-1)**

Although the attempt by appellees to in some way infer that the Commission did consider Rivergate in determining the public interest factor is understandable, we submit that the only way to determine whether this is true or not is to examine the Commission's language. As pointed out, such an examination establishes that no consideration was given to Rivergate.

By restricting its consideration solely to Peninsula, a small and almost infinitesimal part of what this proceeding is about, the Commission clearly did not appraise public interest from the standpoint required. See *Detroit, T. & I. R.R. Control*, 275 I.C.C. 455, 488 (1950); *City of Hialeah, Fla. v. Florida East Coast Ry., et al.*, 317 I.C.C. 34 (1962).

b) The Commission Erroneously Concluded That Treatment of the Entire Portland Area as One Transportation Entity Would Allow Every Railroad in the Undefined Portland Area to Serve the Stations and Industries of Any or All Other Railroads.

Evidently, appellees have conceded that insofar as § 5(2) proceedings are concerned (49 U.S.C., § 5(2)), the fears of the Commission are illusory and could not and would not provide grounds for every railroad in the undefined Portland area to seek to serve the stations and industries of any or all other railroads.

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*All similar references are to the complete record before the Commission stipulated by the parties to the three judge court.

**Expected development of Rivergate is thoroughly discussed in the Petition of the Port of Portland for Reconsideration and Further Hearing before the Interstate Commerce Commission. (R-50, p. 27-32)

The sole argument advanced is that this expressed fear of the Commission, a factor upon which it based its decision, also encompassed § 3(5) proceedings (49 U.S.C., § 3(5)).

In support thereof appellees cite from the Commission's Decision the first paragraph addressed to the *Merits of petitions for inclusion* (J.S., App. B-18). Either by design or inadvertance, appellees did not quote the entire paragraph. The entire paragraph reads as follows:

> "*Merits of petitions for inclusion.*—Though we possess the necessary jurisdiction to require inclusion of Milwaukee and SP in a four-railroad control of Peninsula and to authorize the common use of terminals and facilities requested by SP, *such control* must meet the public interest requirement before any condition we might impose in these respects can be found just and reasonable." (Emphasis added.)

When the entire paragraph is read, it is clear that the Commission was referring to the control application under § 5(2) of the Act and the conditions it may impose in such a situation. See *Atlantic C. L. R.R. v. United States*, 48 F.2d 239, 244 (1931), *aff'd*, 284 U.S. 288, 76 L.Ed. 298, 52 S.Ct. 171 (1932).

Appellees next state that appellants have inaccurately argued that SP "never asserted that its mere presence" gave it the right to serve all stations or industries anywhere within the Portland area. (Motion to Affirm, p. 12) There was nothing inaccurate in any respect about that statement. Reference to the Jurisdictional Statement, pages 12 and 13, shows that the statement had reference to an application under § 5(2) of the Interstate Commerce Act and had no relation to § 3(5) applications. Even if the statement had purported to cover a § 3(5) application, there was no inconsistency in SP's position since its Opening Brief before the Commission pointed out that under

§3(5) bridge track rights were sought. (R-24, p. 13) No evidence was offered as to any intention to serve intermediate points or industries and it was only after the examiner found that the granting of full user rights over the involved accessorial trackage was *most responsive to the public interest* that SP pointed out that its Application in Finance Docket No. 24891 was broad enough to support what the examiner found to be in the public interest. (R-41, p. 38) After the Commission reversed the examiner, SP quite properly stated that it merely sought bridge rights under the Application. (R-49, p. 42) The alleged inconsistency sought to be shown by appellees does not exist.

2. There Is No Substantial Evidence to Support the Commission's Conclusion That Service of Union Pacific and SP&S to and from Peninsula Is Adequate and Efficient.

Appellees allege that appellants are asking this Court to reweigh evidence. That is not the fact. We have stated there is no substantial evidence to support the Commission's finding that Union Pacific and SP&S are providing adequate and efficient service to Peninsula. (J.S., p. 15) We reiterate that statement in this Brief in Opposition. In fact, all evidence of record compels a contrary finding.

Appellees, in an effort to demonstrate that there was testimony to support a finding of adequacy of UP and SP&S service, point to the fact that three of the 13 shippers located on Peninsula's line participated in these proceedings and they supported the applicants (appellees here). What is not pointed out by appellees is that this shipper testimony did *not* have reference to the adequacy and efficiency of the service of Union Pacific and SP&S to Peninsula *but to the service after the traffic reached Peninsula.* (R-26, Tr. 395, 403) This is an entirely different matter and, thus, it is not appellants but appellees who misstate the record. (Motion to Affirm, p. 13)

Appellants are also accused of misstating the evidence concerning the approximate 30-hour time lapse for move-

ment of SP cars from the SP-UP interchange to the UP-Peninsula interchange at North Portland. There was no misstatement on the part of appellants. This is the clear and unequivocable testimony of the General Manager of appellee Union Pacific. (R-26, Tr. 181-82) Appellees are critical of SP's Exhibit 45, which was a ten percent random sample showing the extraordinary length of time taken to deliver these cars to and from Peninsula during the year 1967. Appellees characterize this as a "study conceived and prepared by SP in an effort to show poor service"—appellees are entirely correct in their characterization and appellees' General Manager merely confirms the evidence offered by Southern Pacific.

There is much extraneous discussion about the performance of all railroad functions such as yarding, sorting, inspecting and switching being included within the 30-hour time lapse. Nobody has ever disputed this matter, but the fact remains no matter how appellees wish to characterize it, that from the testimony of their own witness, it took approximately 30 hours for Southern Pacific cars to move from Union Pacific's Albina Yard to the North Portland Interchange, a distance of approximately 5.2 miles. The record reveals unanimous agreement that such service is not adequate or efficient. (J.S., p. 15)

Appellants reiterate loud and clear that the record in this proceeding is patently clear that Union Pacific and SP&S are *not* providing adequate and efficient service to Peninsula.

3. The Rejection by the Commission of Common Use of Terminal Facilities Pursuant to § 3(5) of the Interstate Commerce Act Was Based on Erroneous Conclusions of Law.

Appellees' Motion to Affirm contains a section which claims the Commission correctly construed § 3(5) of the Interstate Commerce Act and was correct in its rejection

of the § 3(5) applications in this case. (Motion to Affirm, pp. 16-19) Appellees appear to have completely missed the point raised by the Jurisdictional Statement. The point actually is very simple. The Commission finds *as a matter of law* that any railroad seeking relief under § 3(5) of the Interstate Commerce Act must be entitled to serve the terminal facilities sought to be reached. The cases cited by appellants (J.S., pp. 16-19), including an analysis of the cases relied upon by the Commission, clearly show that this is not correct. The Commission is wrong in using erroneous conclusions of law as a reason for rejecting the § 3(5) applications. All the discussion by appellees involving invasion of territory, certificates of public convenience and necessity under § 1(18) of the Act, etc., simply has no bearing on the question raised.

4. The Commission Sanctioned a Violation of the Antitrust Laws by Permitting SP&S and UP to Acquire and Control Peninsula Terminal Without Conditioning Said Approval Upon Appellants Southern Pacific and Milwaukee Being Equal Owners of With Access to the Lines of Peninsula.

As pointed out in the Jurisdictional Statement, if appellants are correct that the Commission erred in focusing only on Peninsula to resolve the factor of public interest and that it also erred in finding UP service to and from Peninsula adequate and efficient and in turn used these errors to justify finding the transaction consistent with the public interest, then it is submitted that the exemption provided by § 5(11) of the Interstate Commerce Act has no application. *McLean Trucking Co. v. United States,* 321 U.S. 67, 88 L.Ed. 544, 64 S.Ct. 370 (1944).

Appellees discuss at length a theory of "no change" in competition as justifying applying § 5(11) of the Act to this proceeding. What appellees overlook is the public interest factor. (Motion to Affirm, pp. 20-21) As the United States so ably pointed out in its Memorandum supporting

appellants, the Commission when it examined the competitive impact, looked only to the impact that the inclusion of Milwaukee and Southern Pacific would have on the joint applicants but failed to consider any other factors which must necessarily be dealt with in order to determine where the public interest lies. (Memo for the U.S., pp. 10-11)

REPLY TO THE INTERSTATE COMMERCE COMMISSION'S MOTION TO AFFIRM

The first portion of said Motion to Affirm is the alleged justification for the Commission's failing to grant ownership and access to appellant Milwaukee. It attempts to answer the questions raised by the statutory defendant, the United States, in its Memorandum supporting appellants.

The Commission held that Milwaukee must go back to this same Commission in the *Northern Lines Merger* proceeding and ask for modification of the condition or imposition of new conditions. The error present in that holding is skillfully handled in the Memorandum for the United States, pages 4 through 8.

The Commission held that Condition 24 of the *Northern Lines* case was not applicable to trackage and territory in which other carriers, such as UP, had a joint interest and, thus, refused to give effect to the Portland condition in Milwaukee's favor in this proceeding. There appears to be no rational basis for the Interstate Commerce Commission's conclusion and as the United States has ably pointed out, it fails to understand how Condition 24 of the *Northern Lines* case can be evaded by joining Union Pacific in the takeover of Peninsula. As stated: "We fail to understand why Burlington Northern must be allowed to do jointly what it could not do alone." (Memo for the U.S., p. 7)

Furthermore, it is well settled that the granting of a § 5 application can be conditioned in whatever way necessary to satisfy the public interest. *Atlantic C. L. R.R. v. United States*, 48 F.2d 239 (1931), *aff'd*, 284 U.S. 288, 76 L.Ed. 298, 52 S.Ct. 171 (1932). This being the case, how can the Commission fail to impose a condition which would result in giving effect to the obvious intention of Condition 24(a). The importance of this condition was stated by this Court when it said that Milwaukee's "past failure to become a meaningful competitor came in large part because its lines did not reach into Portland, Oregon . . .". *Northern Lines Merger* cases, 396 U.S. 491, 515.

The balance of the Interstate Commerce Commission's Motion to Affirm adds nothing which has not previously been dealt with in this Brief in Opposition.

CONCLUSION

For the foregoing reasons, appellants urge that probable jurisdiction should be noted.

Respectfully submitted,

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